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THE CURTILAGE OF *OLIVER V. UNITED STATES* AND *UNITED STATES V. DUNN*: HOW FAR IS TOO FAR?

*Ah, yet e'er I descend to th' grave
May I a small house, and large garden have!*
Abraham Cowley, THE MISTRESS, OR LOVE VERSES

INTRODUCTION

The 1984 United States Supreme Court decision in *Oliver v. United States*¹ revived the open fields doctrine,² and announced a return to place-specific analysis of fourth amendment questions. *Oliver* sought to establish a per se “bright line” rule that as a matter of law would exclude the “open field” around a residence from fourth amendment protection, and thus represents an attempt by the Court to avoid the ad hoc, case-by-case analysis of privacy expectations such as that required under *Katz v. United States*.³ The Court’s 1987 decision in *United States v. Dunn*⁴ reiterated the rehabilitation of the open fields doctrine in *Oliver*, and set out a four-part test for determining the extent of the open fields in the context of fourth amendment search and seizure issues involving residences.

Oliver and *Dunn* present substantial difficulties to police and courts attempting to implement the rules of the cases in the field and courtrooms. An examination of the two cases reveals that no genuinely autonomous doctrine has been revived: applying the open fields “doctrine” of *Oliver* and *Dunn* involves virtually the same inquiries as the “reasonable expectation of privacy” test of *Katz*. Rather than providing a bright line rule that will efficiently dispose of fourth amendment problems, it is read-

1. 466 U.S. 170 (1984).

2. The history of the open fields doctrine is sketched *infra* at notes 5-54 and accompanying text.

3. 389 U.S. 347 (1967).

4. 107 S.Ct. 1134 (1987).

ily foreseeable that in addition to challenges under *Katz*, defendants will also routinely challenge residential searches under *Oliver* and *Dunn*. Because analysis under *Katz* and the open fields doctrine are virtually indistinguishable, courts will be compelled to waste time rehashing identical issues. In addition to their negative implications for judicial economy, *Oliver* and *Dunn* represent a retreat from the Court's historic tendency to apply the fourth amendment flexibly and expansively to meet new demands placed on it by an evolving society.

This comment will first gloss the history of the open fields doctrine in fourth amendment jurisprudence; proceed to a review of the factual and procedural contours of *Oliver* and *Dunn*; analyze and comment upon the decisions; and conclude with recommendations for dealing with the difficulties presented by the cases.

THE OPEN FIELDS AND THE CURTILAGE

The open fields doctrine had its birth as a constitutional canon in *United States v. Hester*.⁵ Convicted of concealing moonshine whiskey in violation of Prohibition statutes, appellant Hester claimed that his conviction was constitutionally flawed under the fourth amendment because officers trespassed onto private property to effect the search and seizure that culminated in his arrest.⁶ In his brief opinion in *Hester* Justice Holmes proclaimed, however, that "the special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers, and effects,' is not extended to the open fields."⁷ Since Hester had put the contraband liquor within officers' reach in an open field,⁸ no fourth amendment violation had accrued when the officers seized the contraband. As his rationale for the Court's new rule, Justice Holmes offered that "[t]he distinction

5. 265 U.S. 57 (1927).

6. *Id.* Observed by revenue officers, Hester had just concluded a sale of moonshine whiskey to a customer on land apparently in the vicinity of his father's house, when "[a]n alarm was given." *Id.* at 58. Hester seized a jug from his car and fled, as did his customer. One of the officers pursued, and fired a shot. Hester dropped the jug, which broke but retained some of its contents. These were identified as contraband liquor, and led to Hester's conviction. His appeal was based on "the hypothesis that the examination of the vessels took place upon Hester's father's land." *Id.* at 59.

7. *Id.* at 59.

8. *Id.*

between [the open field] and the house is as old as the common law.”⁹ The common law doctrine to which Holmes adverted was the curtilage, for which he had to turn as far back as Blackstone for authority.¹⁰ The problem that *Hester* hatched lies in the fact that the open field, which does *not* receive fourth amendment protection, lies outside the curtilage, an area surrounding the residence which *does* receive protection.¹¹ *Hester*, however, failed to define either the “open field” or the “curtilage,” and thereby presented substantial difficulties to courts and police attempting to apply the new rule.¹²

*Olmstead v. United States*¹³ attempted to resolve some of the practical difficulties presented by *Hester*. *Olmstead* was the head of a ring engaged in the illicit distribution of liquor, and was convicted of violation of the National Prohibition Act¹⁴ as the result of information from taps on his phone lines. He alleged the taps violated his fourth amendment rights.¹⁵ Taking a literal approach to the language of the amendment, the Court declared that only a “*physical invasion* of [an individual’s] house ‘or curtilage’” (emphasis added)¹⁶ came within the scope of the amendment; since the Court found that the phone taps did not involve any physical intrusion into *Olmstead*’s house, they thus did not violate the amendment. In making the degree of actual physical intrusion the dispositive test in residential

9. *Id.*

10. 4 W. BLACKSTONE, COMMENTARIES *223, 225, 226. The curtilage doctrine had its roots in criminal law, defining the area outside of, but near enough to, a structure wherein a burglary may be committed. Whether a doctrine grounded in property concerns (protecting it from burglary) is properly to be extended to fourth amendment privacy analysis is a troubling proposition. See *infra* notes 18-20 and accompanying text.

It is ironic that Justice Holmes should have sought his authority for the open fields doctrine in the antiquated concept of the curtilage. It was Holmes, after all, who complained that “[i]t is revolting to have no better reason for a rule of law than that it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.” Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897). Holmes, hoist by his own petard?

11. See *supra* note 10.

12. See *infra* notes 13-26 and accompanying text.

13. 277 U.S. 438 (1928).

14. *Id.* at 455-56.

15. *Id.* at 456-57.

16. “The Fourth Amendment. . .[is not] violated. . .unless there has been an official search and seizure of [an individual’s] person, or such a seizure of his papers or his tangible material effects, or an actual physical invasion of his house ‘or curtilage’ for the purpose of making a seizure.” *Id.* at 466.

searches and seizures challenged under the fourth amendment, *Olmstead* originated the "constitutionally protected area"¹⁷ analysis that was to be critical to fourth amendment jurisprudence until *Katz v. United States* dispensed with it.

The announcement of the open fields doctrine (and its necessary homolog, the curtilage) in *Hester* and *Olmstead* has been the subject of criticism. Remarking on the incongruity of the notion that a common law rule dealing with the protection of property¹⁸ should bear upon a constitutional amendment that protects the privacy interests of individuals,¹⁹ one commentator declared that: "[I]t is bizarre that the curious concept of curtilage, originally taken to refer to the land and buildings within [a] baron's stone walls, should ever have been deemed to be of controlling significance as to the constitutional limits upon the powers of the police."²⁰

In addition to their precarious doctrinal underpinnings, *Hester* and *Olmstead* presented significant practical difficulties to police and courts attempting to apply the rules of the cases. "Constitutionally protected area" analysis required complicated ad hoc, fact-specific determinations to find just where the protected curtilage left off and the unprotected open fields began. Not surprisingly, disparate results were reached in similar factual situations. Fourth amendment protection was variously granted and denied to garages,²¹ barns²² and hen houses.²³ Pro-

17. *Katz v. United States*, 389 U.S. 347, 350 (1967).

18. "In the section of Blackstone's Commentaries to which the Court cited, Blackstone described the elements of common law burglary." *United States v. Dunn*, 107 S.Ct. 1134, 1139 n.3 (1987). See also *supra* note 10 and accompanying text.

19. See *Camara v. San Francisco*, 387 U.S. 523, 528 (1967): "The basic purpose of this [Fourth] Amendment, as recognized in countless decisions of this Court, is to safeguard the *privacy* and security of individuals against *arbitrary invasions by governmental officials*. (Emphasis added)."

20. 1 W. LAFAVE, SEARCH AND SEIZURE 314 (1978). See also *supra*, note 10 and accompanying text.

21. *Taylor v. United States*, 286 U.S. 1 (1932) (garage protected by fourth amendment); *Martin v. United States*, 183 F.2d 436 (4th Cir. 1950) (garage protected by fourth amendment but warrantless search permissible where officer made prior "painstaking investigation"); *State v. Brochu*, 237 A.2d 418 (Me. 1967) (detached garage within scope of warrant); *State v. Manning*, 134 N.W.2d 91 (1965) (nonconsensual entry of garage is impermissible search). But see *Carney v. United States*, 163 F.2d 784 (9th Cir. 1947) (fourth amendment did not apply to detached garage); *People v. Lees*, 257 Cal. App. 2d 363, 64 Cal. Rptr. 888 (1967) (permitting warrantless search of rented garage).

22. *Rosencranz v. United States*, 356 F.2d 310 (1st Cir. 1966) (small barn near house

tection was extended to a smokehouse²⁴ and a bathhouse,²⁵ but disallowed to other outbuildings.²⁶

In 1967, the Supreme Court in *Katz v. United States*²⁷ held that the proper test for granting or denying fourth amendment protection was not an analysis of the locus of a challenged search or seizure, but an inquiry into whether the individual invoking the amendment's protection entertained a reasonable expectation of privacy in the place searched.²⁸ In *Katz*, an electronic eavesdropping device attached to the outside of a public telephone booth detected information in his conversations that led to petitioner Katz' arrest for interstate transmission of wagering information over telephone lines.²⁹ Both Katz and the government applied *Olmstead* analysis: Katz urged that the phone booth was a "constitutionally protected area" for purposes of fourth amendment protection, and the government argued that it was not.³⁰ The Court rejected the *Olmstead* approach. Reasoning that "the Fourth Amendment protects people, not places[,]""³¹ Justice Stewart for the majority announced that the proper inquiry is whether a search or seizure "violate[s] the privacy upon which [Katz] justifiably relied."³² Under this analysis, the Court held that "what [Katz sought] to preserve as private, even in an area accessible to the public, may be constitutionally protected."³³ The Court concluded that Katz had a justifiable expectation of privacy in his conversations in the telephone booth, and the conversations were therefore protected under the fourth amendment. In removing "places" from

within curtilage of house); *Walker v. United States*, 225 F.2d 447 (5th Cir. 1955) (fenced barn 70-80 yards from house within curtilage of house).

23. *People v. Lind*, 370 Ill. 131, 18 N.E. 189 (1938) (warrantless search of chickenhouse impermissible). *But see Hodges v. United States*, 243 F.2d 281 (5th Cir. 1957) (fenced chickenhouse 150 feet from house not within curtilage of house).

24. *Roberson v. United States*, 165 F.2d 752 (6th Cir. 1948) (smokehouse within curtilage of house).

25. *Wakkuri v. United States*, 67 F.2d 844 (6th Cir. 1933) (bathhouse adjacent to house within curtilage of house).

26. *Brock v. United States*, 256 F.2d 55 (5th Cir. 1958) (concrete block outbuilding 150-180 feet from nearest residence not within curtilage of residence).

27. 389 U.S. 347 (1967).

28. *Id.* at 360 (Harlan, J., concurring).

29. *Id.* at 348.

30. *Id.* at 351.

31. *Id.*

32. *Id.* at 353.

33. *Id.* at 351.

fourth amendment decisional calculus, the Court cut away the tangled and contradictory³⁴ thicket of rules and precedent that had accumulated under the rubric of the "constitutionally protected area."³⁵

The vitality of the open fields doctrine after *Katz* was uncertain. Although it had explicitly overruled *Olmstead*,³⁶ *Katz* did not overrule *Hester*.³⁷ Subsequently, when faced with curtilage problems, lower courts divided between reliance on the *Katz* "reasonable expectation of privacy" test and continued resort to the venerable *Hester* doctrine. The view of most courts appears to have been that *Katz* rendered the open fields doctrine obsolete, perhaps through redundancy:³⁸ if the ultimate criterion of fourth amendment analysis is the existence of a reasonable expectation of privacy, finding that a search or seizure had been carried out in the "open field" could be considered equivalent to the conclusion that the area was so far removed from a residence (in either distance or purpose) that no legitimate expectation of privacy could attach. A number of courts held, however, that the open fields doctrine continued to be applicable in relevant cases,³⁹ and some commentary found the lat-

34. See *supra* notes 21-26, and accompanying text.

35. "[T]his Court has occasionally described its conclusions in terms of 'constitutionally protected areas,' . . . but we have never suggested that this concept can serve as a talismanic solution to every Fourth Amendment problem." *Katz v. United States*, 389 U.S. 347, at 351, n.9. "We conclude that the underpinnings of *Olmstead* . . . have been [] eroded by our subsequent decisions. . . [and] can no longer be regarded as controlling." *Id.* at 353.

36. [A]lthough a closely divided Court supposed in *Olmstead* that surveillance without any trespass and without the seizure of any material object fell outside the ambit of the Constitution, we have since departed from the narrow view on which that decision rested. . . . We conclude that the underpinnings of *Olmstead* . . . have been so eroded by our subsequent decisions that the 'trespass' doctrine there enunciated can no longer be regarded as controlling.

Id. at 353.

37. *Id.* at 360-61 (Harlan, J., concurring).

38. See, e. g.: *United States v. Swart*, 679 F.2d 698, 702 (7th Cir. 1982) (*Katz* supplants the open fields doctrine); *United States v. Freie*, 545 F.2d 1217, 1223 (9th Cir. 1976), *cert. denied*, 430 U.S. 966 (1977) (open field merely an aspect of determination of reasonableness of privacy expectation); *People v. McClaugherty*, 193 Colo. 360, 566 P.2d 361 (1977) (open fields doctrine made obsolete by *Katz*); *State v. Stanton*, 7 Or. App. 286, 490 P.2d 1274 (1971) (open fields doctrine made obsolete by *Katz*). See also Note: *Florida v. Brady: Can Katz survive in open fields?*, 32 AM. U.L. REV. 921, 930 (1983).

39. *Air Pollution Variance Bd. v. Western Alfalfa Corp.*, 416 U.S. 861 (1974) (search valid despite official's trespass on private property); *United States v. Cain*, 454 F.2d 1285

ter cases—and the open fields and curtilage doctrines themselves—not necessarily inconsistent with *Katz*.⁴⁰

Applying the *Katz* test presented other problems. *Katz* properly focussed fourth amendment litigation on the protection of societally reasonable privacy interests, an ultimate purpose⁴¹ of the amendment. Weighing matters in the scales of the amendment's ultimate purposes is likelier to reach right results than a hair-splitting sojourn into the formalistic jurisprudence of "constitutionally protected areas." But the determination of just what is or is not a reasonable expectation of privacy under *Katz* requires a detailed inquiry into, and an ad hoc weighing of, the facts of any case raising a fourth amendment challenge to a search or seizure. The contours of the analysis require: first, a determination of whether or not an actual subjective privacy expectation existed in the case at bar; and second, whether that expectation was one that society was prepared to accept as reasonable.⁴² In particular, the determination of societally acceptable reasonableness, involving as it does a divination of broad societal expectations, invites police and courts to attempt delicate judgments based on vague and shifting criteria.⁴³

In its 1984 decision in *Oliver v. United States*,⁴⁴ the United States Supreme Court rejected case-by-case analysis of warrantless searches of rural or semi-rural residences.⁴⁵ The Court in-

(7th Cir. 1972) (warrantless search of property open to hunters was permissible).

40. This [continued reliance on the curtilage doctrine] is not particularly objectionable, for there is no reason to view *Katz* as having somehow reduced the protection of in-curtilage structures; surely a justified expectation of privacy exists as to them. But it will no longer do to declare routinely that any entry of a structure beyond the curtilage is not a Fourth Amendment search.

W. LAFAVE, *supra*, note 20, at 315.

41. *Katz* addresses principally the privacy aspect of the amendment. The amendment's other purpose is the prevention of state abuses of its police power. *See supra* note 19.

42. *Katz v. United States*, 389 U.S. 347, 361 (Harlan, J., concurring).

43. "Few issues are more vexed than the meaning in particular situations of a 'reasonable expectation of privacy.'" *Tarantino v. Baker*, 825 F.2d 772, 775 (4th Cir. 1987).

44. 466 U.S. 170 (1984).

45. "Nor would a case-by-case approach provide a workable accommodation between the needs of law enforcement and the interests protected by the Fourth Amendment." *Id.* at 181.

stead sought to substitute a "bright line"⁴⁶ rule that "an individual has no legitimate expectation that open fields will remain free from warrantless intrusion by government officers[;]"⁴⁷ open fields would therefore be per se excluded from fourth amendment protection. The Court explicitly reaffirmed *Hester*,⁴⁸ asserting that the open fields doctrine is consistent with *Katz* analysis of fourth amendment issues.⁴⁹

Unfortunately, *Oliver*, like *Hester* before it, did not furnish any clear insight into the practical difficulties of determining the border between the curtilage and the open fields. The "constitutionally protected area" analysis of *Olmstead*, formerly applied to open fields questions, had been overruled in *Katz* and was no longer available.⁵⁰ Nevertheless, Justice Powell, writing for the majority, apparently did not believe that the absence of a clear standard for applying *Oliver* would be a substantial problem. He maintained that: "[F]or most homes, the boundaries of the curtilage will be clearly marked; . . . the conception defining the curtilage. . . is a familiar one easily understood from our daily experience."⁵¹ Nevertheless, mindful of the lack of a clear test for the application of the *Oliver* rule,⁵² three years later the Court in *United States v. Dunn*⁵³ announced four factors⁵⁴ to be considered in resolving questions of the extent of an alleged curtilage.

46. Note, *Affirmation of the Open Fields Doctrine: The Oliver Twist*, 46 OHIO ST. L.J. 729 (1985); Comment, *Oliver v. United States: Powell Chases Katz Out of the Fields*, 62:3 & 4 DEN U.L. REV. 899 (1985).

47. *Oliver v. United States*, 466 U.S. 170, 181 (1984).

48. "In this light, the rule of *Hester v. United States*. . . that we reaffirm today. . . ." *Id.* at 178.

49. *Id.* at 177.

50. Because the Court in *Katz* had expressly overruled *Olmstead*, but not *Hester*, the *Oliver* majority therefore presumably declined to rehabilitate *Olmstead* as it had *Hester*. See *supra* note 35.

51. *Oliver v. United States*, 466 U.S. 170, 182, n.12 (1984).

52. "Drawing upon the Court's own cases and the cumulative experience of the lower courts that have grappled with the task of defining the extent of a home's curtilage. . . ." *United States v. Dunn*, 107 S.Ct. 1134, 1139 (1987).

53. 107 S.Ct. 1134 (1987).

54. *Id.* at 1139.

OLIVER V. UNITED STATES AND UNITED STATES V. DUNN: THE FACTUAL AND PROCEDURAL BACKGROUND

I. *OLIVER V. UNITED STATES*

Oliver was a consolidation of two cases. In the first, petitioner Oliver was convicted under 21 U.S.C. § 841(a)(1) of manufacturing a controlled substance.⁵⁵ In response to an anonymous tip that he was growing marijuana on his Kentucky farm, police officers went to Oliver's property to investigate.⁵⁶ The officers drove up Oliver's private road past several "no trespassing" signs and petitioner's house to a locked gate posted with a "no trespassing" sign.⁵⁷ They walked around the gate and for several hundred yards beyond, until they reached the vicinity of a barn and parked camper; there they were hailed by an unseen individual, who shouted, "No hunting is allowed, come back up here."⁵⁸ The officers, however, continued their search until they came upon a field of marijuana more than a mile from Oliver's house.⁵⁹ The field was "highly secluded. . .and bounded on all sides by woods, fences and embankments and [could not] be seen from any point of public access."⁶⁰ Applying *Katz* analysis, the district court suppressed evidence of the marijuana field; the court held that Oliver had a reasonable expectation of privacy in the field because he had done all that could be expected to assert his privacy interest in the field by choosing its secluded location and inhibiting public access to it.⁶¹ The Court of Appeals for the Sixth Circuit reversed.⁶²

The Supreme Court concurred with the Sixth Circuit and held that neither Oliver's precaution of locking and posting the gate, nor the seclusion of the cultivated field, were sufficient to bring the marijuana patch within the protection of the fourth amendment.⁶³ Conceding that these precautions may have evi-

55. *Oliver v. United States*, 466 U.S. 170, 173 (1984).

56. *Id.*

57. *Oliver v. United States*, 686 F.2d 356, 362 (6th Cir. 1982) (Keith, J., dissenting).

58. *Oliver v. United States*, 466 U.S. 170, 173 (1984).

59. *Id.*

60. *Id.* at 174.

61. *Id.* at 173-74.

62. *Id.* at 174.

63. *Id.* at 182.

denced petitioner's *subjective* privacy expectations, the Court ruled that it was nevertheless also necessary that Oliver's subjective privacy expectation be one that *society* would recognize as "reasonable."⁶⁴ Reaffirming *Hester*,⁶⁵ the Court found that any privacy expectation in an open field is per se unreasonable.⁶⁶ Since the Court went on to agree with the Sixth Circuit that the marijuana patch was an open field, the patch was therefore necessarily to be denied fourth amendment protection, and Oliver's conviction was therefore affirmed.⁶⁷

The pertinent facts in the companion case were similar. Responding to an anonymous tip, two police officers followed a path into woods behind respondent Thornton's house in rural Maine, where they discovered two marijuana patches.⁶⁸ After determining that the patches were on Thornton's property, the officers secured a warrant to seize the marijuana.⁶⁹ Thornton was arrested and indicted for marijuana cultivation on the basis of this seizure.⁷⁰ In response to his motion to suppress, the trial court found that Thornton had evinced a reasonable expectation of privacy in his property and that the open fields doctrine thus did not apply; the motion to suppress was granted.⁷¹ The Maine Supreme Judicial Court affirmed.⁷²

The Supreme Court, as in the case of petitioner Oliver, found that Thornton's marijuana patches were in an open field. Again applying the new rule that as a matter of law no reasonable expectation of privacy attaches to an open field,⁷³ the majority held that respondent Thornton was not protected by the fourth amendment from the warrantless search of his property. Thornton's case was therefore reversed and remanded.⁷⁴

64. "[T]he correct inquiry is whether the government's intrusion infringes upon the *personal* and *societal* values protected by the Fourth Amendment." (Emphasis added.) *Id.* at 182-83.

65. *Id.* at 178.

66. "[N]o expectation of privacy legitimately attaches to open fields." *Id.* at 180.

67. *Id.* at 174.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 175.

72. *Id.*

73. *Id.* at 181.

74. *Id.* at 184.

II. *UNITED STATES V. DUNN*

In *United States v. Dunn*,⁷⁵ respondent Dunn appealed convictions for various offenses involving controlled substances (phenylacetone and amphetamine) under 21 U.S.C. § 846.⁷⁶ Dunn's co-defendant had been detected purchasing drug-manufacturing equipment and supplies; authorities secured a warrant to plant electronic tracking devices in the paraphernalia, through which it was subsequently traced to Dunn's ranch.⁷⁷ Federal and local law enforcement officers made a warrantless entry onto Dunn's property to investigate.⁷⁸ Crossing the perimeter fence and at least one of several interior fences, the officers traversed the large ranch until they reached a clearing where Dunn's house and several outbuildings were located; these structures were surrounded by woods a half mile from the public road and were not visible from outside the ranch's perimeter fence.⁷⁹ Detecting the odor of suspicious chemicals, the officers climbed over the locked gate in the exterior fence of a barn located some distance from the house and peered into the barn's interior, where they saw what they believed to be a drug laboratory.⁸⁰ This barn was of "substantial" construction, and its interior could be viewed only with difficulty.⁸¹ The next day, the officers made two more warrantless entries onto the ranch to confirm their discovery.⁸² Based on their observations, the officers obtained a warrant which they executed two days later, seizing drugs and drug manufacturing equipment and supplies.⁸³

United States v. Dunn took a convoluted path to the Supreme Court. The district court refused Dunn's motion to suppress the evidence seized at his ranch, and he and his co-defendant were convicted.⁸⁴ The Court of Appeals for the Fifth Circuit

75. 107 S.Ct. 1134 (1987).

76. *Id.* at 1137.

77. *Id.*

78. *United States v. Dunn*, 766 F.2d 880, 883 (5th Cir. 1985).

79. *Id.* at 882.

80. *United States v. Dunn*, 107 S.Ct. 1134, 1137-38 (1987).

81. *Id.* at 1145 (Brennan, J., dissenting, citing *United States v. Dunn*, 674 F.2d 1093, 1100 (5th Cir. 1982)).

82. *Id.* at 1138.

83. *Id.*

84. *Id.*

reversed; applying open fields analysis,⁸⁵ the court found that the evidence had been seized as a result of unlawful warrantless searches within the curtilage of respondent's residence.⁸⁶ On its first encounter with *Dunn*, the Supreme Court vacated and remanded for reconsideration in light of *Oliver*,⁸⁷ which it had recently handed down.⁸⁸ On remand, the Fifth Circuit at first affirmed; although it concluded that the barn was not within the curtilage of Dunn's house, the Fifth Circuit ruled that Dunn nevertheless had a reasonable privacy expectation in the barn.⁸⁹ Before this decision could be reviewed by the Supreme Court, however, the Fifth Circuit recalled it and reinstated its original opinion that the barn was within the protected curtilage of respondent's house.⁹⁰

Dunn then returned to the Supreme Court. Based on the revival of the open fields doctrine in *Oliver*,⁹¹ the Court first held that *Dunn* would be decided under the doctrine,⁹² and then evolved a four-part test for use in fourth amendment controversies to determine the extent of any curtilage which might exist: "[1] the proximity of the area claimed to be curtilage to the home, [2] whether the area is included within an enclosure surrounding the home, [3] the nature of the uses to which the area is put, and [4] the steps taken by the resident to protect the area from observation by people passing by."⁹³ Applying this test, the Court found that, despite the seclusion of the structures and the fences and woods surrounding it, the clearing on which Dunn's house and barn were located was an open field, and under *Oliver* is per se excluded from fourth amendment protection.⁹⁴ The officers' discovery of the laboratory inside the barn thus did not violate the fourth amendment, because their observations of the barn interior had been made from an open field where the officers could be present without violating the amend-

85. *United States v. Dunn*, 674 F.2d 1093, 1100 (5th Cir. 1982).

86. *Id.*

87. *Oliver v. United States*, 466 U.S. 170 (1984).

88. *United States v. Dunn*, 107 S.Ct. 1134, 1138 (1987).

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at 1139.

93. *Id.*

94. See *supra* notes 65-66, and accompanying text.

ment.⁹⁵ The judgment of the Fifth Circuit was therefore reversed.⁹⁶

OLIVER V. UNITED STATES AND UNITED STATES V. DUNN: ANALYSIS AND COMMENT

I. OLIVER V. UNITED STATES

Oliver v. United States explicitly revived the open fields doctrine enunciated in *Hester v. United States*,⁹⁷ and made clear the Supreme Court's conviction that the doctrine is consistent with *Katz* fourth amendment analysis.⁹⁸ The revival of the open fields doctrine also necessarily led to the renewed vitality of the curtilage in fourth amendment analysis.⁹⁹ The *Oliver* majority relied on three analyses to support its holding: first, a literal reading of the fourth amendment;¹⁰⁰ second, a finding that open fields do not harbor those "intimate" domestic activities which the fourth amendment is designed to protect from governmental interference;¹⁰¹ and third, the advantages of a simple per se rule over ad hoc, fact-specific analysis for determination of fourth amendment issues.¹⁰²

These three aspects of *Oliver* will be examined and commented upon separately below. A summary will then suggest an approach preferable to the open fields doctrine of *Oliver*.

1. The Court's Literal Approach to the Fourth Amendment

As the first step in reestablishing the open fields doctrine, the *Oliver* majority looked first to the literal meaning of the

95. *United States v. Dunn*, 107 S.Ct. 1134, 1141 (1987).

96. *Id.* Dunn had also made an alternative argument that he enjoyed a legitimate expectation of privacy in the barn independent of *Oliver* open fields theory. The majority found that since there was only observation of, and not entry into, the barn's interior, any privacy expectation Dunn may have entertained was not violated. *Id.* at 1140-41.

97. 265 U.S. 57 (1924).

98. *Oliver v. United States*, 466 U.S. 170, 184 (1984): "We conclude that the open fields doctrine. . . in *Hester* accords with the 'reasonable expectation of privacy' [i.e., *Katz*] analysis developed in subsequent decisions of this Court."

99. "[O]nly the curtilage, not the neighboring open fields, warrants the Fourth Amendment protections that attach to the home." *Id.* at 180.

100. *Id.* at 176-77.

101. *Id.* at 179.

102. *Id.* at 181.

fourth amendment. Strictly construing the language of the amendment, the Court reasoned that since open fields are not "persons, houses, papers, [or] effects," they are not to be accorded the amendment's protection.¹⁰³ (In his concurrence, Justice White favored deciding *Oliver* entirely on this literal approach to the amendment, declaring: "However reasonable a landowner's expectations of privacy may be, those expectations cannot convert a field into a 'house' or an 'effect.'"¹⁰⁴) The Court's intention in adopting this "literal" approach was apparently to simplify inquiries into extra-residential searches under the fourth amendment, by simply defining away a large area in which the amendment could be implicated. Any simplification of the problem was precluded, however, when the Court conceded that although it is not specifically mentioned in the amendment, the curtilage, too, is subject to fourth amendment protection. The term "houses," for purposes of interpreting the fourth amendment, also includes that area around a house wherein occurs the "intimate activity"¹⁰⁵ associated with domestic life. Under the "literal" approach of *Oliver*, therefore, analysis will return to the complex task of locating the border between the open fields and the curtilage which historically bedeviled the open fields doctrine.¹⁰⁶

Aside from its failure to simplify analysis of extra-residential searches, there is another objectionable feature to the "literal" reading of the fourth amendment adopted by the Court. While it suggests a continuing restrictive view of the scope of the fourth amendment, and comports with a number of recent decisions by the Court taking a stringent view of protection available under the amendment,¹⁰⁷ the literal approach runs counter to a long-established trend of the Court preferring flexible reading of the amendment. In a world in which technological advances steadily enhance the ability of the government to erode individ-

103. *Id.* at 176-77.

104. *Id.* at 184 (White, J., concurring).

105. *Id.* at 180.

106. See *supra* notes 11-26 and accompanying text.

107. See, e.g., *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (search of student property by school authorities requires neither warrant nor probable cause); *United States v. Leon*, 468 U.S. 897 (1984) (evidence seized by police in good faith reliance on defective warrant is not subject to the exclusionary rule); *Nix v. Williams*, 467 U.S. 431 (1984) (evidence seized without warrant is not subject to the exclusionary rule if its discovery would have been inevitable anyway).

ual privacy in ways never envisioned by the Framers, a narrow view of the amendment's reach does more violence to the Framers' intentions than does a liberal reading which encompasses developing challenges to the values protected by the amendment. For example, in his 1977 opinion in *United States v. Chadwick*,¹⁰⁸ Chief Justice Burger stated that: "[T]he Framers were men who focused on wrongs of that day but who intended the Fourth Amendment to safeguard fundamental values which would far outlast the specific abuses which gave it birth."¹⁰⁹ In his celebrated dissent in *Olmstead*,¹¹⁰ Justice Brandeis in 1928 argued that: "[Constitutional c]lauses guaranteeing to the individual protection against specific abuses of power, must have a . . . capacity for adaptation to a changing world[. A] principle to be vital must be capable of wider application than the mischief which gave it birth."¹¹¹ Justice Harlan, concurring in *Katz*, correctly observed that "limitation of Fourth Amendment protection is, in the present day, bad physics as well as bad law, for reasonable expectations of privacy may be defeated by electronic as well as physical invasion."¹¹²

There is another reason that Brandeis' view in *Olmstead*¹¹³ is in particularly germane counterpoint to *Oliver's* literal approach to the amendment. Not only was *Olmstead* a central case in the development of the *Hester* open fields doctrine that *Oliver* reaffirmed, but Justice Holmes, the author of *Hester*, wrote a dissent in *Olmstead* which largely adopted Brandeis' dissent.¹¹⁴ Contrary to the circumspect approach to the fourth amendment the *Oliver* majority adopted in order to resuscitate the open fields doctrine of *Hester*, it appears that Holmes felt that a liberal reading of the fourth amendment is the preferable view, and moreover that the open fields doctrine itself should be applied with restraint.¹¹⁵

108. 433 U.S. 1 (1977).

109. *Id.* at 9.

110. *Olmstead v. United States*, 277 U.S. 438 (1928).

111. *Id.* at 472-73 (Brandeis, J., dissenting).

112. *Katz v. United States*, 389 U.S. 347, 362 (1967) (Harlan, J., concurring).

113. *Olmstead v. United States*, 277 U.S. 438, 472-73 (Brandeis, J., dissenting).

114. *Id.* at 469 (Holmes, J., dissenting).

115. Holmes was particularly disturbed by the specter of illegal and possibly criminal acts by authorities:

It is desirable that criminals should be detected, and to that end that all available evidence should be used. It is also desir-

2. *No Societally Reasonable Privacy Expectation Is Possible In Open Fields*

The second base of the revival of the open fields doctrine in *Oliver* was the Court's holding that no expectation of privacy which society would recognize as reasonable and legitimate could attach to an open field.¹¹⁶ The majority traced the following course to reach its conclusion. First, the fourth amendment "reflects the recognition of the Framers that certain enclaves should be free from arbitrary government interference,"¹¹⁷ and this insight underlies the Court's "overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic."¹¹⁸ The "sanctity of the home" in turn precludes any societally reasonable expectation of privacy in activities occurring in open fields, because they do not partake of the domestic intimacy¹¹⁹ that characterizes activities taking place in and immediately about the home. Hence society has no interest in protecting the "cultivation of crops,"¹²⁰ and such other activities that occur in an open field. Activities in the open field are further compromised, suggested the majority, by their being difficult to protect from the view of either public or police, even by fencing and posting against trespassing.¹²¹

The Court's sweeping generality that society is not prepared to recognize reasonable privacy expectations beyond the domestic intimacy of the curtilage, runs afoul of both *Katz v. United States*¹²² and common sense. *Katz* held that "the Fourth

able that the Government should not itself foster. . . other crimes, when they are the means by which the evidence is to be obtained. . . . We have to choose, and for my part I think it a less evil that some criminals should escape than that the Government should play an ignoble part.

Id. at 470 (Holmes, J., dissenting).

116. "[A]n individual may not legitimately demand privacy for activities conducted out of doors in fields[.]" *Oliver v. United States*, 466 U.S. 170, 178 (1984).

117. *Id.*

118. *Id.*

119. "[O]pen fields do not provide the setting for those intimate activities that the Amendment is intended to shelter from government interference or surveillance." *Id.* at 179.

120. *Id.*

121. *Id.*

122. 389 U.S. 347 (1967).

Amendment protects people, not places,”¹²³ and further that what an individual “seeks to preserve as private, *even in an area accessible to the public*, may be constitutionally protected.” (Emphasis added.)¹²⁴ To arbitrarily declare that a certain *place*—the open fields, even when accessible to the public—will never enjoy societally reasonable privacy expectations, cuts directly against the meaning of *Katz*.

Common sense suggests that it is not at all clear that society would deny, as per se unreasonable, certain privacy expectations in open fields, such as those of the resident of a cabin on secluded mountain acreage whose interest in occupying the property is precisely in the privacy that it affords him. In dissent,¹²⁵ Justice Marshall took up this point and chided the majority for their reluctance or inability to imagine *any* socially reasonable privacy expectations that could be entertained in open fields. He suggested that “[p]rivately owned woods and fields that are not exposed to public view regularly are employed in a variety of ways that society acknowledges deserve privacy.”¹²⁶ He mentioned as potential private uses a resident’s solitary strolls, lovers’ trysts, religious gatherings, and creative activities.¹²⁷ Despite the majority’s flat assertion to the contrary, it is difficult to believe that society would not concede the reasonableness of privacy expectations in any of these activities, and many others as well.

3. *The Difficulties in Case-by-Case Determination of Fourth Amendment Issues*

The third reason advanced by the *Oliver* majority for the rehabilitation of the open fields doctrine was the majority’s desire to avoid the necessity of complex factual determinations of fourth amendment values, particularly by the police in the field. Weighing socially reasonable privacy expectations under an ad hoc approach such as *Katz v. United States* requires,¹²⁸ the Court asserted that “police officers would have to guess before

123. *Id.* at 351.

124. *Id.* at 351-52.

125. *Oliver v. United States*, 466 U.S. 170, 192 (1984) (Marshall, J., dissenting).

126. *Id.*

127. *Id.*

128. See *supra* notes 41-43 and accompanying text.

every search whether landowners had erected fences sufficiently high, posted a sufficient number of warning signs, or located contraband in an area sufficiently secluded to establish a right of privacy."¹²⁹ The Court obviously felt that holding that open fields per se do not enjoy a societally reasonable expectation of privacy would avoid this type of inquiry. On the contrary, *Oliver* requires case-by-case analysis at least as involved as any required by *Katz*.¹³⁰

The Court correctly stated in *Oliver* that a protected privacy expectation must not only be subjectively held by the individual, but also societally reasonable: "[T]he correct inquiry is whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment." (Emphasis added.)¹³¹ The majority then announced that there is no societally reasonable privacy expectation in an open field.¹³² As noted above,¹³³ the majority justified this conclusion by pointing out that the only out-of-doors area that can presume to socially reasonable privacy expectations is the curtilage, the "area immediately surrounding the home."¹³⁴ Only within the curtilage occur those "intimate activit[ies]"¹³⁵ that the fourth amendment is intended to protect. Since by definition the open field is outside the curtilage, there thus can be no social value in protecting the presumably non-intimate activities that occur in open fields.¹³⁶ The central inquiry for police and courts applying *Oliver* is therefore to determine just where the border between the protected curtilage and the unprotected open field lies. And this is

129. *Oliver v. United States*, 466 U.S. 170, 181 (1984).

130. *United States v. Dunn*, 107 S.Ct. 1134 (1987) sought to lay down a test that would resolve extent of curtilage problems raised by applying *Oliver* in the field. See *infra* notes 152-58 and accompanying text. But even *Dunn* could not eliminate the necessity under *Oliver* to approach curtilage problems on a case-by-case basis. See *State v. Waldschmidt*, 740 P.2d 617, 622 (Kan. Ct. App. 1987): "In *Oliver*, . . . the Supreme Court refused to do a case-by-case analysis to ascertain whether, on occasion, an individual's expectation of privacy in a certain activity in an open field should be protected. [But i]n *Dunn*, it is apparent that, from the Court's analysis of whether a barn located within a fenced area was of the type used for intimate family activities, the Court embarked on a case-by-case analysis."

131. *Oliver*, 466 U.S. 170, 182-83.

132. "[T]he . . . expectation of privacy in open fields is not an expectation that 'society recognizes as reasonable.'" *Id.* at 179.

133. See *supra* notes 116-21 and accompanying text.

134. *Id.* at 178.

135. *Id.* at 180.

136. *Id.* at 179.

precisely where *Oliver's* most serious shortcoming arises.

Oliver tells us that courts "have defined the curtilage, as did the common law, by reference to the factors that determine whether an individual *reasonably* may *expect* that an area immediately adjacent to the home will remain *private*." (Emphasis added.)¹³⁷ This language is virtually indistinguishable from *Katz*, under which an individual's privacy will be protected when his or her *privacy expectation* is *reasonable*.¹³⁸ The area around a residence eligible for fourth amendment protection under *Oliver*—wherever an individual enjoys reasonable expectations of privacy—is the very same area eligible for protection under *Katz*. *Oliver* has therefore not revived an autonomous doctrine, but merely restated *Katz*.

If *Oliver* is merely *Katz* paraphrased, it is reasonable to ask what, then, is objectionable about *Oliver*. The likely result of *Oliver* is waste of judicial resources. It is foreseeable that defendants will routinely challenge open field searches and seizures under both *Katz* and *Oliver*; prosecution and defense would be compelled to argue reasonable expectation of privacy theories under *Katz* and open fields theories under *Oliver*. Since the criteria of either analysis are indistinguishable,¹³⁹ a court applying the open fields doctrine will thus litigate the same facts under two separate theories (i.e., *Katz* and *Oliver*), only to reach the same conclusion in both inquiries. If an avowed object of the *Oliver* majority was to make life simpler for courts,¹⁴⁰ it is difficult to see just what is to be gained by doubling a court's work to reach an unaltered result. It is easy, however, to see just what is to be lost: time and, therefore, money.

SUMMARY

Oliver is distressingly unsatisfactory in each of its major aspects. The decision is grounded in a literal reading of the fourth

137. *Id.* at 180.

138. "[Protection under the Fourth Amendment is granted when] a person [has] exhibited an actual (subjective) expectation of *privacy* and. . .the *expectation* [is] one that society is prepared to recognize as '*reasonable*.'" (Emphasis added.) *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

139. See *supra* notes 137-38 and accompanying text.

140. See *supra* notes 128-30 and accompanying text.

amendment which runs counter to much of the Court's fourth amendment jurisprudence.¹⁴¹ It makes an arbitrary and unconvincing determination that what a resident does on one part of his property society is prepared to consider reasonably private, but not that which he does on another part of the same property.¹⁴² The opinion sought to announce a "bright line" rule designed to avoid ad hoc factual determinations by police and courts, but instead created a rule which actually requires precisely those determinations.¹⁴³

Oliver has not escaped the notice and criticism of commentary. Reservations have been expressed over *Oliver's* retreat from expansive fourth amendment jurisprudence, and especially over the difficulties anticipated in applying *Oliver's* "bright line" rule.¹⁴⁴ Ironically, the Sixth Circuit, from which *Oliver* had gone up to the Supreme Court, expressed pointed disapproval of the holding when it had to apply *Oliver* in a subsequent case.¹⁴⁵

A far better result that *Oliver* could have reached was the adoption of the rule suggested by Justice Marshall in dissent: "A clear, easily administrable rule emerges. [P]rivate land *marked in a fashion sufficient to render entry thereon a criminal trespass* under the law of the State in which the land lies is protected by the Fourth Amendment's proscription of unreasonable searches and seizures." (Emphasis furnished.)¹⁴⁶ The major advantage¹⁴⁷ of Marshall's proposed standard is the ease with which it could be applied: "The police know that body of law [i.e., trespass law], because they are entrusted with responsibil-

141. See *supra* notes 103-15 and accompanying text.

142. See *supra* notes 116-27 and accompanying text.

143. See *supra* notes 128-40 and accompanying text.

144. See e.g.: Comment, *Affirmation of the Open Fields Doctrine: The Oliver Twist*, 46 OHIO ST. L.J. 729 (1985); Note, *Criminal Procedure — Oliver and the Open Fields Doctrine*, 7 CAMPBELL L. REV. 253 (1984); Note, *Oliver v. United States: Powell Chases Katz Out of the Fields*, 62:3 & 4, DEN U.L. REV. 899 (1985). But see Note, *Closing the "Open Fields" Question: Oliver v. United States*, 1985 B.Y.U. L. REV. 191; Note, *Curtilage or Open Fields? Oliver v. United States Gives Renewed Significance to the Concept of Curtilage in Fourth Amendment Analysis*, 46 U. PITT. L. REV. 795 (1985).

145. *United States v. Hoskins*, 735 F.2d 1006 (6th Cir. 1984). The majority in *Hoskins* was overt enough in their disapproval of *Oliver* that Nichols, J., concurring, felt it prudent to distance himself from the language of the majority opinion.

146. *Oliver v. United States*, 466 U.S. 170, 195 (1984) (Marshall, J., dissenting).

147. Another recommendation for Marshall's proposal is that it eliminates the appearance of courts permitting illegal trespass by the police on private property. For a discussion of this point, see *infra* notes 187-93 and accompanying text.

ity for enforcing it against the public; it therefore would not be difficult for the police to abide by it themselves.”¹⁴⁸

A further advantage to using criminal trespass as a threshold test for open field searches is that it would not appreciably hinder law enforcement. The trespass test need not be a per se rule that outright forbids a warrantless police intrusion onto private property, but merely a presumption that the property enjoys a constitutionally protected privacy interest under the fourth amendment. This presumption could be rebutted whenever a warrantless search or seizure came within any of the recognized exceptions to the warrant requirement such as plain view,¹⁴⁹ consent,¹⁵⁰ hot pursuit,¹⁵¹ or others.

UNITED STATES V. DUNN

Mindful of the difficulties to be anticipated in applying *Oliver*,¹⁵² the Court in *United States v. Dunn*¹⁵³ set out to resolve them by establishing a test for delimiting the curtilage of a residence that will receive protection under the fourth amendment after *Oliver*.¹⁵⁴

Dunn reiterated the revival of the open fields doctrine in *Oliver*,¹⁵⁵ and again declined to accept Justice Marshall's suggestion that criminal trespass be the basic test of fourth amendment privacy expectations in the curtilage.¹⁵⁶ Instead, “[d]rawing upon the Court's own cases and the cumulative experience of the lower courts that have grappled with the task of defining the extent of a home's curtilage,”¹⁵⁷ the *Dunn* majority stated that curtilage questions should be resolved with particular reference to four factors: (1) the proximity of the claimed

148. *Id.* at 196.

149. *Coolidge v. New Hampshire*, 392 U.S. 1 (1968).

150. *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973).

151. *Dorman v. United States*, 435 F.2d 385 (D.C.Cir. 1970).

152. See *infra* note 154 and accompanying text.

153. 107 S.Ct. 1134 (1987).

154. “We granted the Government's petition for certiorari to decide whether the area near a barn. . . is, for Fourth Amendment purposes, within the curtilage.” *Id.* at 1137.

155. “We reaffirmed the holding of *Hester* in *Oliver v. United States*.” *Id.* at 1139.

156. *Id.* at 1145 n.3 (Brennan, J., dissenting).

157. *Id.* at 1139.

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curtilage area to the home, (2) whether the claimed curtilage is within an enclosure surrounding the home, (3) the use(s) to which the claimed curtilage was put and, (4) steps taken by the resident to protect the claimed curtilage from observation by passersby.¹⁵⁸

Even though the majority itself admitted that its test does not constitute a "finely tuned formula"¹⁵⁹ that will solve every curtilage problem, it would be reasonable to expect that the factors would at least reflect the Court's priorities in evaluating open fields-curtilage controversies. Unfortunately, examination of the factors reveals that their contours are slippery and imprecise. At least when considered in the abstract, the *Dunn* factors appear to be poor predictors of the outcome of curtilage cases. Each of the factors will be examined separately below. A summary will then suggest an approach preferable to the difficulties posed by *Dunn*.

1. *"The proximity of the area claimed to be curtilage to the home"*

This first *Dunn* factor¹⁶⁰ has an initial appeal; it stands seemingly to reason that the farther away from the resident's house a specific site may be, the less likely are the resident's privacy expectations in that site to be reasonable. But there is a logical defect to this reasoning. Proximity is at the heart of any curtilage problem; there is some distance beyond the house past which fourth amendment protection simply will not reach. The problem faced by authorities conducting a warrantless search (and courts reviewing the authorities' actions) is to remain *in* the unprotected open fields and *outside* the protected curtilage. Their primary concern will be how close, how *proximate*, to a house they may come, without violating the resident's reasonable expectation of privacy. When the policeman's problem is thus one of proximity, it is tautological to suggest that somehow proximity is simultaneously the solution to his problem.

158. *Id.*

159. "We do not suggest that combining these factors produces a finely tuned formula that, when mechanically applied, yields a 'correct' answer to all extent-of-curtilage questions." *Id.*

160. *Id.*

2. “Whether the area is included within an enclosure surrounding the home”

This second *Dunn* factor¹⁶¹ may be a reliable indicator of the curtilage in many cases. The usefulness of this factor would probably be limited to urban and suburban contexts, however, with their relatively small parcels of residential land. There, fences and enclosures in most instances probably correspond to their owners’ privacy expectations, because the enclosure also corresponds to property lines. But this factor may be of marginal utility in rural areas. There, fences may have less to do with privacy expectations than with protecting children, lawns, gardens and pets from farm vehicles and livestock.¹⁶²

The majority suggested as much when it declined the government’s invitation to create a “first fence” rule, to the effect that the fence nearest to a house marks the extent of the house’s curtilage.¹⁶³ The Court declined the invitation because “[a]pplication of the Government’s [rule] might well lead to diminished Fourth Amendment protection in those cases where a structure lying outside a home’s enclosing fence was [nevertheless] used for domestic purposes.”¹⁶⁴ The Court also pointed out that “in those cases where a house is situated on a large parcel of property and has no nearby enclosing fence, the Government’s rule would serve no utility; a court would still be required to assess the [other] factors [of the *Dunn* test] to define the extent of the curtilage.”¹⁶⁵ With qualifications, this second factor of *Dunn* could prove useful in fixing the border between the curtilage and the open field in some cases.

3. “The nature of the uses to which the area is put”

This third factor of the *Dunn* test¹⁶⁶ harks back directly to *Oliver*¹⁶⁷ in its inquiry into the type of activity that distinguishes

161. *Id.*

162. *See infra* note 164 and accompanying text.

163. *Dunn*, 107 S.Ct. 1134, 1139 n.4.

164. *Id.*

165. *Id.*

166. *Id.*

167. *Oliver v. United States*, 466 U.S. 170 (1984).

the curtilage¹⁶⁸ from the open field.¹⁶⁹ The majority found it “especially significant that the law enforcement officials possessed objective data indicating that [Dunn’s] barn was not being used for *intimate activities of the home*.” (Emphasis furnished.)¹⁷⁰ Theoretically, if a police officer can be reasonably certain that an area of residential property is not used for intimate domestic purposes, he or she can thus be reasonably certain that the area is in the open field and not the curtilage. But the determination of the operative principle of this factor—domestic intimacy—requires the complex ad hoc judgments that *Oliver* deplored,¹⁷¹ because *Dunn* is silent on just how an officer is to decide what is and is not an intimate domestic activity for purposes of fourth amendment analysis.

4. “*The steps taken by the resident to protect the area from observation by people passing by*”

This fourth factor of the *Dunn* test¹⁷² is simply an aspect of the subjective privacy expectation prong of *Katz* privacy expectation analysis.¹⁷³ The precautions taken by a resident to protect his property from public view in many cases would likely be an accurate indication of the resident’s subjective privacy expectations. But, like the third *Dunn* factor,¹⁷⁴ this factor also invites complex on-the-spot evaluations in the field; officers would have to determine if a resident’s precautions evidenced a subjective privacy expectation that satisfies *Katz*. If the precautions established a sufficient subjective privacy interest, the officer must then confront the other prong of the *Katz* test,¹⁷⁵ and make the difficult determination of whether the resident’s privacy expectation is one that society would recognize as reasonable.¹⁷⁶ Thus,

168. “[I]ntimate activity.” *Id.* at 178.

169. “[N]ot . . . the setting for those intimate activities.” *Id.* at 179.

170. *United States v. Dunn*, 107 S.Ct. 1134, 1140 (1987).

171. *Oliver v. United States*, 466 U.S. 170, 181 (1984).

172. *Dunn*, 107 S.Ct. 1134, 1139 (1987).

173. “My understanding of the rule that has emerged. . . is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy. . . .” *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (emphasis added).

174. See *supra* notes 166-71 and accompanying text.

175. “[S]econd, that the expectation be one that society is prepared to recognize as ‘reasonable.’” *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

176. See *supra* note 43 and accompanying text.

rather than avoiding the ad hoc police judgments required by *Katz*, this factor of *Dunn* directly requires them.

SUMMARY

On balance, the four factors of the *Dunn* test are unlikely to contribute materially to the solution of open fields-curtilage problems. The first factor merely restates the crux of every curtilage issue.¹⁷⁷ The second factor would probably be useful in urban and suburban contexts, but may be of only dubious utility where rural curtilages are in controversy.¹⁷⁸ The third factor and fourth factors are relevant, but invite precisely the same case-by-case factual determinations that *Oliver* sought to avoid.¹⁷⁹

CONCLUSION

There are hints in *Oliver* and *Dunn* which may suggest why the Court wished to revive the open fields doctrine of *Hester*. In its language distinguishing the open fields from the curtilage, the majority repeatedly emphasized how limited it considered the reach of the curtilage;¹⁸⁰ the renewed open fields doctrine may perhaps represent the Court's desire to limit the extent of residential privacy expectations that it is prepared to find reasonable in fourth amendment controversies generally. This would be consistent with a recent tendency of the Court to take a narrower view of fourth amendment protection.¹⁸¹ On the other hand, a common thread running through all three cases subsumed within *Oliver* and *Dunn* is the involvement of drug offenses;¹⁸² the Court may instead or also be signalling that it is prepared to give very little fourth amendment slack to the suspect in a *drug* case.¹⁸³

177. See *supra* note 160 and accompanying text.

178. See *supra* notes 161-65 and accompanying text.

179. See *supra* notes 166-76 and accompanying text.

180. "[T]he land immediately surrounding and associated with the home. . . . an area immediately adjacent to the home." (Emphasis added.) *Oliver v. United States*, 466 U.S. 170, 180 (1984).

181. See *supra* note 107 and accompanying text.

182. See *supra* notes 55, 70, and 76 and accompanying text.

183. In an approximately nine month period following the time *Dunn* was handed down on March 3, 1987, lower courts that have relied on or cited to *Dunn* have largely adopted this approach: the majority of their decisions have dealt with prosecutions for drug-related offenses. See e. g.: *U. S. v. Calabrese*, 825 F.2d 1342 (9th Cir. 1987) (conspir-

Whatever the ultimate purpose behind them, *Oliver* and *Dunn* say too much and accomplish too little. *Oliver* posited a "bright line" test — the open fields doctrine — which was intended to avoid ad hoc factual judgments of fourth amendment issues by police and courts,¹⁸⁴ but nevertheless requires precisely the ad hoc determinations it sought to avoid.¹⁸⁵ *Dunn* compounds the problem by proposing a test for determining the extent of the curtilage which appears to be of little potential use in ameliorating the practical difficulties of applying *Oliver*.¹⁸⁶

A particularly troubling aspect of both *Oliver* and *Dunn* is their majorities' apparent indifference to the constitutional implications of potential criminal trespass by the police operating under the open fields doctrine.¹⁸⁷ In his dissent in *Oliver*, Justice

acy to manufacture and distribute methamphetamine); *Feliciano v. City of Cleveland*, 661 F.Supp. 578 (N.D. Ohio 1987) (drug testing of police academy cadets); *People v. Morgan*, 196 Cal. App. 3d 816, 242 Cal. Rptr. 142 (1987) (possession of cocaine for sale); *People v. Morgan*, 195 Cal. App. 3d 479, 240 Cal. Rptr. 658 (1987) (cultivation and possession of marijuana for sale); *Riley v. State*, 511 So.2d 282 (Fla. 1987) (cultivation of marijuana); *State v. Waldschmidt*, 12 Kan. App. 2d 284, 740 P.2d 617 (1987) (possession of marijuana with intent to sell and possession of drug paraphernalia); *State v. Stokes*, 511 So.2d 1317 (La. Ct. App. 1987) (cultivation of marijuana); *State v. Krech*, 403 N.W.2d 634 (Minn. 1987) (possession and possession with intent to sell cocaine); *State v. Tarantino*, 358 S.E.2d 131 (N.C. Ct. App. 1987) (manufacturing marijuana); *Grider v. State*, 743 P.2d 678 (Okla. Crim. App. 1987) (cultivation and possession of marijuana with intent to distribute); *Commonwealth v. Lemanski* 529 A.2d 1085 (Pa. Super. Ct. 1987) (manufacture of marijuana and possession of a controlled substance); *Leal v. State*, 736 S.W.2d 907 (Tex. Ct. App. 1987) (possession of marijuana); *Kearney v. Commonwealth*, 855 S.E.2d 897 (Va. Ct. App. 1987) (possession of drugs with intent to distribute and possession of drug paraphernalia); *State v. Bell*, 108 Wash.2d 193, 737 P.2d 254 (1987) (cultivation of marijuana); *State v. Petty*, 48 Wash. App. 615, 740 P.2d 879 (1987). *But see e. g.*: *State v. Ball*, 219 N.J. Super. 501, 530 A.2d 833 (1987) (receiving stolen property); *State v. Washington*, 357 S.E.2d 419 (N.C. Ct. App. 1987) (breaking and entering, felony larceny, and possession of stolen goods).

184. See *supra* notes 128-30 and accompanying text.

185. See *supra* notes 131-40 and accompanying text.

186. See *supra* notes 160-76 and accompanying text.

187. This was particularly egregious in *Dunn*. There, it is apparent that probable cause sufficient to justify the issuance of a search warrant existed *before* the officers' warrantless intrusions on Dunn's property: "The government makes a compelling argument that it had probable cause." *United States v. Dunn*, 674 F.2d 1093, 1100 (6th Cir. 1982). The court noted the accumulation of equipment and chemicals—known through aerial and electronic surveillance to be at Dunn's ranch—purchased by Dunn's co-defendant with cash and some under alias, Dunn's prior criminal record involving controlled substances, and the remoteness of Dunn's property. *Id.* Except for deficient police work, therefore, the multiple police trespasses onto Dunn's property would not have been necessary. "Accepting that probable cause to search the ranch property existed on November 5 and 6, a search warrant was mandatory unless exigent circumstances excused that constitutional requirement." *Id.* But "[a]lthough obtained on the night of

Marshall expressed his concern on this point.¹⁸⁸ He stated that “a deliberate entry by a private citizen onto private property marked with ‘No Trespassing signs will expose him to criminal liability. I see no reason why a government official should not be obliged to respect such unequivocal and universally understood manifestations of a landowner’s desire for privacy.”¹⁸⁹

The majority attempted to discount the gravity of this potential problem by asserting that because trespass is a *property* crime, fourth amendment *privacy* concerns are therefore not implicated in official trespass on private property. It argued that “trespass law extends to instances where the exercise of the right to exclude vindicates no legitimate privacy interest, [and] the government’s intrusion upon an open field [is therefore not] a ‘search’ in the constitutional sense because that intrusion is a trespass.”¹⁹⁰ According to the majority, a violation of trespass laws by police conducting a warrantless search or seizure thus would not comprehend privacy expectations protected by the fourth amendment. Elsewhere in *Oliver*, however, the majority vitiated this argument when it allowed that “[t]he existence of a property right is but one element in determining whether *expectations of privacy* are legitimate.” (Emphasis added.)¹⁹¹ By its own concession, the majority admits that abuse of property rights by nonconsensual police intrusion can contribute to the elevation of a common law trespass to the level of a fourth amendment violation.

Aside from the constitutional implications, there is another reason to be concerned with the potential for police trespass under the open fields doctrine of *Oliver* and *Dunn*. One purpose of the fourth amendment is to limit the police powers of the state.¹⁹² It is difficult to think of a more appropriate limit on the powers of police than ensuring that the police themselves do not themselves violate a law which they are obliged to enforce

November 6, 1980, the warrant was not executed until approximately 10:00 a. m. on November 8, despite the entry of agents on November 7. The necessity for swift action, which purportedly justified the warrantless entries on November 5 and 6, is not apparent in the officers’ post-warrant conduct.” *Id.* at 1102.

188. *Oliver v. United States*, 466 U. S. 170, 184 (1984) (Marshall, J., dissenting).

189. *Id.* at 194-95.

190. *Id.* at 183.

191. *Id.*

192. *See supra* note 19.

against others—in this case criminal trespass. Justice Brandeis' *Olmstead* dissent is worth considering in this regard: "Our Government is the potent, the omnipresent teacher. For good or ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law."¹⁹³

Oliver and *Dunn* are wild cards existing alongside *Katz*. Police and courts will have to waste valuable time making the same analysis under "open fields" theory that is required under the *Katz* inquiry into reasonable expectations of privacy,¹⁹⁴ and additionally comply with any case law construing the new open fields "doctrine." Because defendants henceforth will probably routinely attack extra-residential searches and seizures under both *Katz* and open fields analysis,¹⁹⁵ the open fields doctrine of *Oliver* and *Dunn* gratuitously compounds whatever difficulties already are involved in fourth amendment jurisprudence under *Katz*.¹⁹⁶

With *Dunn*'s explicit approval of *Oliver*, it is unlikely the Court will retreat from its revival of the open fields doctrine any time soon. It is possible, however, to avoid many of the analytical and practical difficulties that appear to be inevitable in dealing with the doctrine. The Court's best alternative, of course, would have been to adopt Justice Marshall's suggestion that criminal trespass is likely to be the most reliable index of protectable privacy interests in any potential curtilage.¹⁹⁷ State courts may still adopt this position outright if their state constitutions are more solicitous of privacy interests than is the fourth amendment of the federal constitution.¹⁹⁸ Even federal courts

193. *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

194. See *supra* notes 137-38 and accompanying text.

195. *Id.* at 139-40.

196. See e.g.: *State v. Tarantino*, 358 S.E.2d 131 (N.C. Ct. App. 1987) (on remand for reconsideration in light of *Dunn*. Held: despite reconsideration instructions of state supreme court, *Katz* reasonable expectation of privacy analysis controls, not *Dunn* extent-of-curtilage analysis. "The decision of the United State Supreme Court in *Dunn* did nothing to alter the rule that the Fourth Amendment applies whenever the person invoking its protection has exhibited an actual expectation of privacy which society is prepared to recognize as reasonable." *Id.* at 133.).

197. See *supra* notes 146-51 and accompanying text.

198. See e.g.: *Grider v. State*, 743 P.2d 678, 682 (Okla. Crim. App. 1987), which noted: "[T]he United States Supreme Court's 'explicit acknowledgement of the right of state courts, as the final interpreters of state law to impose higher standards on searches

can avoid the problems of *Oliver* and *Dunn* by heeding *Dunn*'s disclaimer that: "We do not suggest that combining these factors [of the *Dunn* test]. . . yields a 'correct' answer to all extent-of-curtilage questions. Rather, these factors are useful analytical tools *only to the degree that*, in any given case, *they bear upon the centrally relevant consideration*—whether the area in question is so intimately tied to the home itself that it should be placed under the home's 'umbrella' of Fourth Amendment protection." (Emphasis added.)¹⁹⁹ Since the Court has therefore not required that the *Dunn* factors be controlling, federal and state courts are both free—and well-advised—to consider trespass law as a "fifth *Dunn* factor" which can in most cases reliably indicate the presence and extent of protectable fourth amendment privacy interests. If any standard is to provide the "bright line" test that *Oliver* and *Dunn* sought to create, criminal trespass by police is the most tenable candidate.

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and seizures than those required by the federal constitution.' " (Parks. J., concurring, citing *Turner v. City of Lawton*, 733 P.2d 375, 381 (Okla. 1986)).

199. *United States v. Dunn*, 107 S.Ct. 1134, 1139 (1987).

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